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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	

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REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits this reply to initial comments filed on June 11, 1996 in the above-captioned docket.[1]

SUMMARY

In this reply, CompTel will address three issues relating to the use of customer proprietary network information ("CPNI") by telecommunications carriers. First, CompTel will respond to comments addressing when a carrier needs customer approval to access its own customers' CPNI. CompTel will show that the arguments in favor of broad, unconsented uses of CPNI would eviscerate Section 222's prohibition on the use of CPNI for cross-marketing purposes. Second, CompTel will address the type of approval necessary,

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[1] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, FCC 96-221 (rel. May 17, 1996) ("*Notice*").

explaining that affirmative, written approval is required from customers for use of their CPNI. Carriers arguing for negative option "approvals" and oral approval misread Section 222(c), and fail to demonstrate that such lesser protection is consistent with Congress' goal of protecting privacy and competitive equity. Finally, CompTel will respond to those comments that claim the passage of Section 222 strips the Commission of authority to regulate the use of CPNI as used by incumbent LECs. The *Notice* correctly interprets Section 222 as an additional requirement which does not affect the Commission's authority to regulate CPNI when such regulation is consistent with the public interest.

I. SECTION 222 REQUIRES CUSTOMER APPROVAL FOR ANY USE OF CPNI TO CROSS-MARKET OTHER TELECOMMUNICATIONS SERVICES

Most commenters agreed with the Commission's conclusion that Section 222 establishes a baseline requirement for customer approval whenever a carrier wishes to use CPNI for cross-marketing.[2] Although many commenters agreed with CompTel that distinctions between "interexchange," "local," and "CMRS" services likely will become increasingly difficult to maintain,[3] the Commission's approach, at least for some interim period, faithfully addresses the types of cross-marketing that Congress intended would require customer approval.

U S West and AT&T, however, advocate a position that would require customer authorization only in the rarest of circumstances. Both contend that the Commission should interpret Section 222 to allow carriers to use their own customers' CPNI without

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[2] *See, e.g.*, Cable & Wireless at 8; Consumer Federation of America ("CFA") at 5-6; MCI at 3-4; Texas PUC at 7.

[3] LDDS WorldCom at 8; Sprint at 2-3; NYNEX at 10-11; PacTel at 3-4.

authorization for any purpose associated with the marketing of any basic telecommunications service.[4] This so-called "broad interpretation" of Section 222 allegedly is needed to promote "efficiency" and to facilitate "one-stop shopping" of telecommunications services.[5]

Such an interpretation cannot be squared with the purposes of Section 222. Section 222(c)(1) allows use of CPNI without customer authorization for only two purposes: to provide "the telecommunications service from which such information is derived" and to provide services used in or necessary to the provision of such service.[6] The broad interpretation advocated by U S West and AT&T would eviscerate Section 222(c)(1), writing out the limitation on use by a carrier. Instead, they would transform Section 222 from a general requirement for customer approval (combined with a specific exception) into an open invitation for unrestricted use of customer information anywhere within a company, limited only by a meaningless exclusion for unrelated marketing.[7] CompTel believes Congress intended significantly more protection for customer privacy and competitive equity than AT&T or U S West propose.

Moreover, the Commission need not sacrifice either efficiency or one-stop shopping to be faithful to Section 222. Under the proposal described in the *Notice*, if a carrier provided a customer with services from more than one category, such as both local and interexchange services, it could use such CPNI to provide all the benefits of one-stop

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[4] AT&T at 5-11; U S West at 1-3.

[5] AT&T at 7, 9-10; U S West at 3-5.

[6] 47 U.S.C. § 222(c)(1).

[7] Under AT&T's proposal, approval would be necessary only if a carrier wanted to use CPNI to market non-telecommunications services. AT&T at 5. However, CPNI is less likely to be useful in such circumstances, and many carriers consequently might never have the need to request approval to use customer CPNI.

shopping that are asserted to follow from AT&T and U S West's proposal. Section 222 simply places large, incumbent carriers on equal footing with new providers in marketing to become a customer's full-service provider. Further, the principal "inefficiency" alleged in the *Computer II* and *Computer III* proceedings -- the inability of carrier sales personnel to respond to customer inquiries (particularly those of residential customers) concerning other telecommunications services -- has been addressed in Section 222. Congress acknowledged, and explicitly permitted, this type of marketing beneficial to consumers.[8] A strained interpretation of Section 222 which strips it of its teeth is not necessary to achieve these public policy goals.

II. AFFIRMATIVE, WRITTEN AUTHORIZATION IS REQUIRED FOR CARRIER ACCESS TO ITS CUSTOMERS' CPNI

In its initial comments, CompTel argued that Section 222 should be read to require a carrier to obtain affirmative, written approval from the customer before using CPNI for cross-marketing purposes.[9] A requirement for such approval was supported by consumer groups, state utility regulators, and a number of telecommunications carriers.[10]

The ILECs, on the other hand, advocated much looser customer authorization requirements. They argue that approval (for carrier use, not third party use), need not even be obtained affirmatively, that it could be implied or presumed from customer inaction.

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[8] *See* 47 U.S.C. § 222(d)(3).

[9] CompTel at 6-7.

[10] CFA at 5; NARUC at 2-3; Texas PUC at 8-9; California PUC at 11; Cable & Wireless at 8-9; LDDS WorldCom at 9-11; ITAA at 5-6

They also argue that any affirmative approval obtained could be oral (again, for carrier use, not third party use). Neither position is consistent with the statute or the public interest.

A. Affirmative Approval

Most ILECs contend that a negative option or "tacit approval" standard applies to carrier use of CPNI pursuant to Section 222(c)(1).[11] These arguments are without merit.

In support of their argument, ILECs rely primarily on the absence in Section 222(c)(1) of language parallel to that appearing in Section 222(c)(2), claiming that the contrast suggests Congress intended customer approval could be implied for Section 222(c)(1) purposes.[12] As CompTel explained in its initial comments, however, this argument misreads Section 222.[13] Section 222(c)(1) and 222(c)(2) are complementary provisions, both of which address a carrier's use of its own customers' CPNI. Section 222(c)(1) requires approval to use, disclose or permit access to CPNI, while Section 222(c)(2) specifies the type of approval that is necessary for such purposes. That is, because Congress specified in Section 222(c)(2) that affirmative (and written) approval was necessary for disclosure "to any person," rather than using a more restrictive term, such as "to any third party," the provision applies to disclosures both within the carrier obtaining the information in the first place and to third parties seeking access to customer information. Therefore, the difference in language does not suggest a different standard, only that Congress intended to specify in Section 222(c)(2) what type of "approval" it was referring to in Section 222(c)(1).

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[11] NYNEX at 15; U S West at 16-17; PacTel at 7-9; Ameritech at 8-10; USTA at 5.

[12] *See, e.g.,* NYNEX at 15.

[13] CompTel at 7.

That Congress intended an affirmative response in Section 222(c)(1) also is supported by Section 222(d)(3) of the Act, which allows use of CPNI for certain inbound telemarketing calls. If customer inaction were sufficient to permit carriers to use CPNI freely, an exception for inbound calls would be unnecessary since most callers would either have affirmatively consented prior to the call or would have been presumed to have consented through their inaction. Indeed, if tacit approval were permitted, Section 222(d)(3) would be an additional approval requirement, rather than an exception, because it would require a carrier to obtain affirmative approval on an inbound call, even though the caller in all likelihood had already "tacitly" approved such use. By contrast, if an affirmative response is required for Section 222(c)(1), then the 222(d)(3) exception makes perfect sense, for it allows carriers to respond to customers who initiate discussions of other services regardless of whether (or how) they have previously responded to a request for such CPNI authorization.[14]

Further, assertions that affirmative authorization is not important to protect privacy or is inconsistent with customer expectations should be summarily rejected. These arguments were made to the Congress during its consideration of the Telecommunications Act of 1996. Section 222 reflects Congress' judgment concerning the expectations of customers and their privacy interests.[15] This is not an appropriate forum for ILECs to attempt to rewrite the statute to eliminate the protections Congress enacted

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[14] As noted earlier, this exception is intended to provide the benefits of one-stop shopping to the customer who desires such a service.

[15] *See* H.R. Rep. No. 104-458, 104th Cong., 2d Sess., at 205 (1996) ("[N]ew section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI").

B. Written Approval

These same carriers, joined by two of the largest interexchange carriers, also argue that customer approval need not be written, either.[16] For the same reasons as explained in the immediately preceding section, arguments in support of an oral consent standard misread the structure of Section 222.[17] Further, oral consent renders the inbound telemarketing exception of Section 222(d)(3) superfluous. If oral consent for all purposes were permissible, there would be no reason to limit the approval obtained on an inbound telemarketing call (which necessarily would be oral) to "the duration of the call."[18]

Moreover, there has been no showing that a written approval requirement is overly burdensome, particularly when the pitfalls of oral approval are considered. Carrier service order forms could easily be adapted to include separate options for customer CPNI, making a written authorization requirement easy to administer. In addition, as the Commission recognized several years ago, oral customer consent is more susceptible to misunderstandings or abuse than is written approval.[19] After the Commission's unhappy experience with slamming, it should be hesitant to authorize widespread use of oral approval in the CPNI context, which is a subject more difficult to understand than the selection of a primary interexchange carrier and more likely to result in customer misunderstandings. Accordingly,

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[16] NYNEX at 15; U S West at 17; PacTel at 5-6; Ameritech at 7; Sprint at 4; MCI at 8.

[17] *See, supra,* pp. 5-6.

[18] *See* 47 U.S.C. § 222(d)(3).

[19] *See Policies and Rules Concerning Changing Long Distqance Carriers*, 7 FCC Rcd 1038, ¶ 42 (1992).

the Commission should require carriers to obtain affirmative written authorization from their customers before using customer CPNI.

III. ADDITIONAL CPNI RULES SHOULD APPLY TO THE ILECs

As CompTel explained in its initial comments, the Commission has additional public policy reasons to be concerned with the ILECs' CPNI practices. Therefore, CompTel supports the retention of the existing CPNI rules applicable to the BOCs and the adoption of additional rules to prevent the ILECs from abusing their control over customer CPNI.

First, the Commission should maintain its CPNI rules for the BOCs.[20] Although the BOCs uniformly oppose continuation of the *Computer II* and *Computer III* CPNI restrictions after the Commission adopts its rules implementing Section 222,[21] these rules were adopted pursuant to authority separate from Section 222, and for public policy reasons uniquely applicable to the BOCs. There is no reason for the Commission to reverse those conclusions here.

It simply is not true, as the BOCs contend, that Section 222 replaces these existing CPNI rules.[22] Nothing in Section 222 or elsewhere in the Act limits the Commission's authority to prescribe additional CPNI rules when they are in the public interest. If the Congress had intended to repeal the CPNI restrictions or limit the Commission's authority to impose additional obligations, it could have done so, as it did, for example, with the

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[20] CompTel at 8.

[21] *See, e.g.,* Ameritech at 14-15; NYNEX at 18-19; SBC at 14-15.

[22] *See* NYNEX at 18-19 (Congress "occupied the field"); Ameritech at 14-15 (Section 222 "supplants" existing CPNI rules).

"competitive checklist" for BOC in-region interLATA entry.[23] Indeed, the BOCs' argument is inconsistent with the fact that Congress required the extension of the Commission's *Computer III* non-structural safeguards -- which include the CPNI restrictions -- to the BOCs' payphone operations.[24] If Congress had intended to replace such rules, it would not have mandated their application to BOC payphone operations.

Second, as shown by CompTel and others, there are significant public policy reasons for maintaining additional requirements over and above the Section 222 obligations for ILECs. ILECs have acquired CPNI under circumstances where the customer lacked an effective choice of carriers, and there is no reason to give special weight to the customer's "decision" to enter into a business relationship with the ILEC.[25] Moreover, ILEC CPNI is more competitively valuable because the ILECs' bottleneck control renders its information more comprehensive than any other carrier's CPNI could be.[26] Thus, ILEC CPNI presents additional concerns of customer privacy and competitive equity not present with respect to the CPNI of other telecommunications carriers.

Third, the ILECs have both the incentive and ability to improperly restrict third-party access to CPNI. As underscored by the initial comments in this docket, the need for the Commission to address such ILEC policies is great. ILECs can, and as explained by Cable & Wireless, have, sought to impose unreasonable conditions in a transparent attempt to

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[23] *See* 47 U.S.C. § 271(d)(4).

[24] *See* 47 U.S.C. § 276(b)(1)(C).

[25] CompTel at 9; *see* LDDS WorldCom at 3-4; MCI at 18-20.

[26] CompTel at 9-10; LDDS WorldCom at 3-4.

thwart potential competitors from marketing their services to ILEC customers.[27] These and similar difficulties have been encountered by other CompTel members as well. Indeed, several ILEC comments suggest such difficulties may become even more widespread. U S West, for example, contends that third party access should be permitted only in "the most extreme of circumstances."[28] PacTel goes further, suggesting that an ILEC has a legitimate interest in "protecting" CPNI from disclosure to competitors who seek to win the customer from the carrier.[29] There is nothing legitimate about ILECs using their historical monopoly position to impede the development of local service competition. These comments, and many carriers' actual experiences, provide clear evidence of the need for Commission action to ensure third parties can obtain access to customer CPNI upon receiving the customer's consent.

Accordingly, CompTel recommends that the Commission:

-- maintain its existing CPNI rules for the BOCs' provision of enhanced services;

-- bar the ILECs from using CPNI for purposes of marketing any services other than local exchange services;

-- require ILECs to provide annual notification to subscribers, for a period of four years, of their CPNI rights (including the right to disclose such information to potential providers of local services); and

-- prohibit ILECs from imposing additional conditions upon third-party access to customer CPNI.

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[27] *See* Cable & Wireless at 11.

[28] U S West at 20.

[29] PacTel at 12-13.

CONCLUSION

For the foregoing reasons, CompTel urges the Commission to adopt a written authorization requirement for carriers' access to CPNI for cross-marketing purposes. The Commission should reject the arguments contending that authorization may be "implied" or "tacit." It also should emphasize that oral authorization is insufficient to permit the use of CPNI except in the limited circumstance specified in Section 222(d)(3). Finally, the Commission should recognize the unique concerns raised by ILEC use of CPNI and adopt additional restrictions for ILECs that go beyond the general requirements of Section 222. Therefore, the Commission should maintain its existing CPNI rules for the BOCs and GTE, and should promulgate additional safeguards applicable to all ILECs.

Respectfully submitted,

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